BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WALTER A. MILLER	)	
Claimant	)	
VS.	)	
	)	Docket No. 177,609
U.S.D. NO. 445	)	
Respondent	)	
AND	)	
	)	
KANSAS ASSOCIATION OF SCHOOL BOARDS	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the November 20, 1997, Award entered by Assistant Director Brad E. Avery. The Appeals Board heard oral argument on May 19, 1998.

APPEARANCES

Claimant appeared by his attorney, John M. Ostrowski of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Eric T. Lanham of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations as specifically set forth in the Award of the Assistant Director are hereby adopted by the Appeals Board. In addition, the parties agreed that this case is a functional impairment case as claimant has returned to work with respondent at a comparable wage and work disability is not in dispute.

ISSUES

(1) What is the nature and extent of claimant's disability?

(2) What is the amount of compensation due?

(3) Is claimant entitled to temporary total disability compensation between February 15, 1993, and August 1, 1993? The parties have stipulated that the issues dealing with claimant's entitlement to medical treatment and the request for the authorization of the treatment provided by Margaret Ayers, M.A., have been withdrawn and are no longer issues before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After having reviewed the entire record, the Appeals Board makes the following findings of fact and conclusions of law.

Findings of Fact

Claimant, a teacher working for respondent's school district, was attending an in-service program when he slipped and fell on ice and snow landing on his back and head. Claimant attempted to continue with the next program but began sweating and the room started moving. When he got up to leave, he started vomiting. He was transported to the Coffeyville hospital by ambulance. He was initially treated in the emergency room where they took x-rays and, after lunch, sent him home. He was treated by Dr. Ho whose records are not in evidence. Later that evening, claimant's condition worsened and his wife again called the ambulance. Claimant was admitted to the hospital and later transferred to St. Francis Hospital in Tulsa, Oklahoma. He came under the care of Dr. Harvey Blumenthal in Tulsa and remained in the hospital for approximately three or four days. At the time of claimant's dismissal, he still had terrible head pressure, vertigo, broken speech, memory problems, fatigue and substantial pain in his neck and back. Claimant also described problems urinating, and thought that he had a kidney infection.

Claimant was treated for several weeks by Dr. Blumental but showed little or no improvement. He then began receiving treatments from Margaret Ayers, M.A., who specializes in psychoneurophysiology or EEG neurofeedback. She is certified by the National Biofeedback and Psychophysiology Society but is not certified by any state to practice any type of medicine, surgery, osteopathy, chiropractic or psychology. She treated claimant for several weeks in March and April 1993 and by April 10, 1993, indicated claimant was no longer shuffling his feet, he was holding his head high, he was talking clear and there had been a dramatic change in his behavior. She continued to treat claimant off and on with the biofeedback with her next examination being August 3, 1994. She treated him for a period of time in the summer of 1994 and again in the summer of 1995.

Claimant was referred to Dr. Randall L. Hendricks, an orthopedic surgeon, in February 1994. At that time, Dr. Hendricks found claimant's condition to be reasonably well maintained. He found no neurological deficits in the upper extremities, sensation, strength, and reflex were normal and, claimant had a full range of lumbar motion. The CT

scan of the brain was normal, although he acknowledged not being an expert on brain CT scans. He also had a record from Dr. White indicating a normal electronystagmography. He felt that 99 percent of claimant's pain was related to the cervical and lumbar areas. He ordered an MRI of the cervical and lumbar regions and found some slight disc desiccation at both L3-4 and L4-5 and a disc protrusion at C5-C6 on the right side. He continued treating claimant and by July 29, 1994, felt claimant had reached maximum medical improvement. He did not diagnose anything seriously wrong with claimant's low back other than mild spondylosis, which he felt was appropriate for claimant's age.

Dr. Hendricks did believe claimant had a ruptured disc in his cervical spine but did not recommend surgery, recommending conservative care as the best route to follow. He released claimant for treatment with a physician closer to his home and rated him at 9 percent to the whole person based upon the C5-C6 disc protrusion. He did not assess any impairment to claimant's lumbar spine. He felt that there may be some emotional overlay involved with claimant's ongoing symptom complaints in part due to the fact that claimant's pain diagram was remarkably abnormal. Dr. Hendricks has not seen claimant since 1994.

Claimant was referred to Dr. P. Brent Koprivica on May 4, 1995, for an evaluation at the request of claimant's attorney. Dr. Koprivica performed a full physical exam including Waddell's testing for symptom magnification, which was negative. He interpreted claimant's MRI scan as showing a right C5-C6 disc herniation and the MRI scan of the lumbar spine as showing degenerative disc disease at L3-4 and L4-5 but did not find any disc herniation in the lumbar spine. He felt claimant had suffered a closed-head injury with residual components, a cervical disc herniation, and chronic cervical and chronic low-back pain associated with degenerative disc disease.

Dr. Koprivica felt the EEG done in February 1993 was abnormal. He also did an ENG (electronystagmogram), which tests the body's balance mechanisms, which was done because of claimant's complaints of dizziness. It is an objective test looking for abnormalities of the inner ear and the brain. If the results show the problem as "central," that would be consistent with a closed-head injury. In this case, the medical record indicated the problem was central. He noted Dr. Blumenthal felt that claimant's problem was not in his brain but in the inner ear mechanism that had been injured in the fall. He opined that spelling problems would be consistent with a closed-head injury. He assessed claimant a 10 percent whole body impairment for the closed-head injury, an 8 percent whole body impairment for the lumbar spine, and an 8 percent whole body impairment for the cervical problems. All combined, he felt claimant had suffered a 23 percent whole body functional impairment as a result of the injuries suffered with respondent. He further felt that the conditions he diagnosed and the resultant impairments were all attributable to the fall of February 1993.

When cross examined, Dr. Koprivica did admit that the EEG taken in April 1993 was considered normal and was virtually identical to the February 1993 EEG. He failed to note any speech inconsistency or speech problems during the exam, and as far as he knew,

claimant was not having any comprehension problem, only speech and spelling problems.

Claimant was examined on August 31, 1995, by Dr. Vito J. Carabetta, board-certified in physical medicine and rehabilitation, at the request of respondent. Dr. Carabetta felt that claimant had suffered residual dysfunction in the brain as a result of the fall, a disc herniation in the cervical spine and a low-back injury. He assessed claimant a 5 percent whole person impairment as a result of the brain injury, an 8 percent impairment of function as a result of the cervical injury, and a 7 percent impairment of function as a result of the low-back injury. In computing claimant's functional impairment, Dr. Carabetta deducted 3 percent, which he felt was preexisting to claimant's low back, resulting in a 16 percent impairment to the body as a whole. However, as claimant's injury occurred prior to July 1, 1993, a deduction of the preexisting functional impairment was not appropriate under K.S.A. 1990 Supp. 44-501(c). Therefore, the Appeals Board finds that a 19 percent functional impairment to the body as a whole is appropriate with this date of accident.

On October 31, 1995, claimant was examined by Dr. Lawrence R. Blaty as part of an independent medical examination ordered by the Administrative Law Judge. Dr. Blaty reviewed claimant's prior medical records including the EEGs performed at St. Francis Medical Center in Tulsa, Oklahoma. The medical reports reviewed indicated a possible benign vertigo suggestive of "paroxysmal disorder with no persistent focal asymmetry." At the time of Dr. Blaty's examination, claimant described persistent, intermittent, dull pain in the back of his neck, and low back over the tail bone and in his right upper extremity. He had pins and needles tingling in the digits of his right hand and loss of strength in the upper extremity. He also described occasional headaches over the right temple but was not experiencing vertigo and his memory problems had improved, as had his balance and speech. Dr. Blaty assessed chronic cervical and thoracolumbar strain and assessed claimant a 10 percent functional impairment to the body as a whole for the cervical and lumbar problems. He assessed no impairment for claimant's head injury.

Conclusions of Law

Claimant requests temporary total disability compensation from February 15, 1993, through August 1, 1993. However, the testimony of Ms. Ayers indicates that claimant's condition had substantially improved by April 10, 1993. The next examination by Ms. Ayers was in August 1994. There was no indication from any expert, medical or otherwise, after April 10, 1993, that claimant was temporarily totally disabled as a result of the injuries suffered with respondent. Therefore, the Appeals Board grants claimant temporary total disability compensation for the period February 16, 1993 through April 10, 1993.

With regard to claimant's functional impairment, the Appeals Board must consider the opinions of the four physicians. While none of the physicians whose testimony is provided were initial treating physicians, Dr. Hendricks did have the opportunity to examine and treat claimant five times over a several month period. In Dr. Hendricks' opinion,

however, claimant suffered no functional impairment in the lumbar spine and no functional impairment from claimant's internal head injuries.

The Appeals Board, as the trier of fact, must decide which testimony is more accurate and credible and must adjust the medical testimony along with testimony of the claimant and any other testimony that may be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. *Id.* at 785.

In reviewing not only the testimony of the medical doctors but also that of Margaret Ayers and the claimant, the Appeals Board finds that claimant did suffer a permanent head injury as a result of the February 15, 1993, fall. Claimant exhibited symptoms at the time of the fall consistent with a head injury including dizziness, severe head pain, and vomiting. Claimant has been diagnosed by both Dr. Carabetta and Dr. Koprivica as having suffered a permanent head injury. The medical opinions of Dr. Koprivica and Dr. Carabetta are found to be the most credible medical evidence in this record. Therefore, the Appeals Board finds claimant has suffered a 21 percent impairment of function to the body as a whole as a result of the injuries suffered on February 15, 1993, and the Award of Assistant Director Brad E. Avery, dated November 20, 1997, is modified accordingly.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Assistant Director Brad E. Avery dated November 20, 1997, should be, and is hereby, modified.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Walter A. Miller and against the respondent, U.S.D. No. 445, and its insurance carrier, Kansas Association of School Boards, for a 21% permanent partial disability to the body as a whole as a result of the injury suffered on February 15, 1993.

Claimant is entitled to 7.71 weeks temporary total disability compensation at the rate of $299 per week totalling $2,305.29, followed thereafter by 407.29 weeks permanent partial disability compensation at the rate of $122.51 per week totalling $49,897.10, for a total award of $52,202.39, based upon a whole body disability.

As of June 3, 1998, claimant is entitled to 7.71 weeks temporary total disability compensation at the rate of $299 per week totalling $2,305.29, followed by 268.58 weeks permanent partial disability compensation at the rate of $122.51 per week totalling $32,903.74, for a total due and owing of $35,209.03, which is ordered paid in one lump sum minus amounts previously paid. Thereafter, claimant is entitled to 138.71 weeks

permanent partial disability compensation at the rate of $122.51 per week, totalling $16,993.36 until fully paid or until further order of the Director.

Claimant's contract for employment with his attorney is affirmed insofar as it does not contradict the applicable version of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Hostetler & Associates, Inc.	
Transcript of Preliminary Hearing	$ 63.70
Gene Dolginoff Associates, Ltd.	
Deposition of P. Brent Koprivica, M.D.	$361.10
Deposition of Vito Carabetta, M.D.	229.10
Deposition of Margaret Ayers, M.A.	Unknown
Appino & Biggs Reporting Service	
Deposition of Walter A. Miller	Unknown
Catherine J. Crow, CSR	
Deposition of Randall Hendricks, M.D.	Unknown
Karen Starkey, CSR	
Transcript of Regular Hearing	$122.40

IT IS SO ORDERED.

Dated this ____ day of August 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John M. Ostrowski, Topeka, KS
Eric T. Lanham, Kansas City, KS
Brad E. Avery, Assistant Director
Philip S. Harness, Director